

Capital Reporting Company  
Arbitration - Volume II 07-29-2010

BEFORE THE UNITED STATES COPYRIGHT ROYALTY JUDGES  
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Washington, D.C.

AUG 1 9 2010

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IN THE MATTER OF: : Docket No. 2009-1  
: CRB Webcasting III  
DIGITAL PERFORMANCE RIGHT in :  
SOUND RECORDINGS and : REBUTTAL PHASE  
EPHEMERAL RECORDINGS. : Volume 2  
-----: (Pages 273 - 306)

Washington, D.C.

Thursday, July 29, 2010

The following pages constitute the  
Rebuttal Phase in the above-captioned matter at the  
Library of Congress, Madison Building, 101  
Independence Avenue, Southeast, Washington, D.C.,  
before Shari R. Broussard, RPR, CSR, of Capital  
Reporting Company, a Notary Public in and for the  
District of Columbia, beginning at approximately 9:37  
a.m. when were present on behalf of the respective  
parties:

1 A P P E A R A N C E S

2 Copyright Royalty Tribunal:

3 CHIEF JUDGE JAMES SLEDGE  
JUDGE WILLIAM ROBERTS  
4 JUDGE STANLEY C. WISNIEWSKI  
Library of Congress  
5 Madison Building  
101 Independence Avenue, Southeast  
6 Washington, D.C. 20540

7 On behalf of SoundExchange, Inc.:

8 JARED O. FREEDMAN, ESQUIRE  
GARRETT A. LEVIN, ESQUIRE  
9 DAVID HANDZO, ESQUIRE  
Jenner & Block, L.L.P.  
10 1099 New York Avenue, Northwest  
Suite 900  
11 Washington, D.C. 20001  
(202) 649-6000

12 On behalf of Live365, Inc.:

13 ABRAHAM YACOBIAN, ESQUIRE  
14 Hovanesian & Hovanesian, P.C.  
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15 Pasadena, California 91101  
(626) 737-7288

16 On behalf of Intercollegiate Broadcasting System:

17 WILLIAM MALONE, ESQUIRE  
18 Miller & VanEaton, P.L.L.C.  
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19 Suite 1000  
Washington, D.C. 20036  
20 (202) 785-0600

21 ALSO PRESENT:

Colin Rushing  
22 Susan Chertkof

Capital Reporting Company  
Arbitration - Volume II 07-29-2010

275

1 C O N T E N T S

2 WITNESS:	DIRECT	VOIR DIRE	CONT'D DIRECT
3 Frederick J. Kass	276	284	291

4

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7 IBS REBUTTAL EXHIBITS: *	MARKED	RECEIVED
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8 Number 1	277	--
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9 Number 2	277	--
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10 Number 3	278	--
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11 Number 4	279	--
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12 Number 5	280	--
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13 Number 6	280	--
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14 Number 7	280	--
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15 Number 8	281	--
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16 Number 9	282	--
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22 (\*Exhibits retained.)

Capital Reporting Company  
Arbitration - Volume II 07-29-2010

276

1 P R O C E E D I N G S

2 CHIEF JUDGE SLEDGE: Good morning, we'll  
3 come to order. All right. Mr. Malone?

4 MR. MALONE: Thank you, Your Honor. IBS  
5 will call Captain Kass.

6 WHEREUPON,

7 CAPTAIN FRED KASS

8 called as a witness, and having been first duly  
9 sworn, was examined and testified as follows:

10 DIRECT EXAMINATION BY COUNSEL FOR IBS

11 BY MR. MALONE:

12 Q Captain Kass, would you give your name for  
13 the reporter, please, and spelling your last name?

14 A Yes, Frederick Kass, K-A-S-S.

15 Q And where do you reside?

16 A 367 Windsor Highway, New Windsor, New York.

17 Q And you've testified before the judges  
18 before?

19 A Yes, I have.

20 MR. MALONE: If I may, Your Honor, I'd like  
21 to distribute some binders to the bench.

22 CHIEF JUDGE SLEDGE: All right.

Capital Reporting Company  
Arbitration - Volume II 07-29-2010

277

1 MR. MALONE: Thank you, Mr. Handzo.

2 BY MR. MALONE:

3 Q I have had placed in front of you a binder  
4 and I'd like to have you identify it. What is the  
5 unnumbered set of pages before Tab 1?

6 A It's my Corrected Rebuttal Testimony.

7 Q And looking at page ten, do you recognize  
8 any of the signatures there?

9 A Those are both my signatures.

10 Q And the Corrected Rebuttal Testimony is true  
11 and correct?

12 A Yes.

13 (IBS Rebuttal Exhibit Number 1 was  
14 marked for identification.)

15 BY MR. MALONE:

16 Q And looking under Tab 1, will you identify  
17 the document under Tab 1?

18 A It's IBS Rebuttal Exhibit 1. It's an IBS  
19 invoice dated April 2010.

20 (IBS Rebuttal Exhibit Number 2 was  
21 marked for identification.)

22 BY MR. MALONE:

Capital Reporting Company  
Arbitration - Volume II 07-29-2010

278

1 Q And under Tab 2?

2 A It's IBS Rebuttal Exhibit 2. It's a  
3 membership certificate for WHRB Harvard University.

4 Q And does it reflect any date?

5 A It -- it says that it's for the academic  
6 year of 2009 to 2010.

7 Q And so is that a representative sample of  
8 the certificates issued by IBS for that academic year?

9 A Yes.

10 (IBS Rebuttal Exhibit Number 3 was  
11 marked for identification.)

12 BY MR. MALONE:

13 Q Under Tab 3, what do you have there?

14 A I have IBS Rebuttal Exhibit 3. The IBS  
15 website screen print from May 17th, 2010 at 3:44 p.m.

16 Q And that's not the entire website?

17 A No. The entire website is 80 some separate  
18 sections and several hundred pages.

19 Q And so what is the significance of this  
20 particular number of pages that you have in the  
21 binder?

22 A This is the few pages of the total several

1 hundred pages that attempts to inform the members on  
2 matters of the Digital Millennium Copyright Act.

3 (IBS Rebuttal Exhibit Number 4 was  
4 marked for identification.)

5 BY MR. MALONE:

6 Q Looking under Tab 4, describe that, please.

7 A It's IBS Rebuttal Exhibit 4. It's a letter  
8 from counsel to Mr. Perrelli at Jenner & Block dated  
9 April 23rd, 2008.

10 Q Have you ever seen this document before?

11 A I have.

12 Q And do you know of the relationship between  
13 this letter and the Intercollegiate Broadcasting  
14 System?

15 A Yes. There were three letters from  
16 Mr. Perrelli in 2008 in reference to -- to our website  
17 and there were three replies from counsel in 2008  
18 regarding the corrections that -- that we had done on  
19 the website, and this is one of the three letters from  
20 counsel.

21 Q As a matter of fact, this is the first,  
22 second or third?

Capital Reporting Company  
Arbitration - Volume II 07-29-2010

280

1           A       I'm not sure, but I believe it's the first.

2   The -- the third was in October of 2010 -- pardon  
3   me -- 2008.

4                   (IBS Rebuttal Exhibit Number 5 was  
5                   marked for identification.)

6   BY MR. MALONE:

7           Q       Under Tab 5, what do you see?

8           A       IBS Rebuttal Exhibit 5, a Jenner & Block  
9   letter to myself dated June 5th, 2008.

10          Q       And looking at the second paragraph there --  
11   strike that question.

12                   (IBS Rebuttal Exhibit Number 6 was  
13                   marked for identification.)

14   BY MR. MALONE:

15          Q       Identify the document under Tab 6, please.

16          A       IBS Rebuttal Exhibit 6. A letter from  
17   counsel to Jenner & Block dated June 16th, 2008.

18                   (IBS Rebuttal Exhibit Number 7 was  
19                   marked for identification.)

20   BY MR. MALONE:

21          Q       And under Tab 7?

22          A       IBS Rebuttal Exhibit 7. A letter from



1 Miller & VanEaton, counsel for IBS, to Jenner & Block,  
2 dated October 14th, 2008, and I believe that's the  
3 final letter.

4 Q Did you ever receive any reply from the  
5 addressee?

6 A Never received any reply nor any further  
7 indication that there was anything more open on this  
8 issue from Jenner & Block.

9 (IBS Rebuttal Exhibit Number 8 was  
10 marked for identification.)

11 BY MR. MALONE:

12 Q Under Tab 8, what do you have there?

13 A IBS Rebuttal Exhibit 8, College  
14 Broadcasters, Incorporated Supplemental Response to  
15 the Intercollegiate Broadcasting System, Incorporated  
16 Interrogatory.

17 Q We'll leave the blank tab for a moment.

18 MR. MALONE: I think if Your Honors please,  
19 the confusion of the numbering would be ameliorated if  
20 I were allowed to mark the corrected rebuttal  
21 testimony as IBS Rebuttal Exhibit 9. So you would  
22 then have nine separate exhibit numbers for the

1 Corrected Rebuttal Testimony and attachments. Then --

2 CHIEF JUDGE SLEDGE: I understand you to say  
3 then that Exhibit 9 that you're proposing is just the  
4 Corrected Rebuttal Testimony?

5 MR. MALONE: That's correct, just the ten  
6 pages.

7 (IBS Rebuttal Exhibit Number 9 was  
8 marked for identification.)

9 MR. MALONE: I think the nine exhibits  
10 having been identified, I would respectfully move  
11 their admission.

12 CHIEF JUDGE SLEDGE: One at a time.

13 MR. MALONE: One at a time.

14 All right. Turning to what we've just  
15 marked as Exhibit 9, I move the submission.

16 CHIEF JUDGE SLEDGE: Any objection to  
17 Exhibit 9?

18 MR. LEVIN: Yes, Your Honor. I noted at the  
19 outset that counsel did not ask Mr. Kass if he --  
20 Captain Kass if he had prepared the testimony that he  
21 presented as Number 9.

22 At Captain Kass' deposition he, in fact,

1 when presented with his purported Written Rebuttal  
2 Testimony was unable to recognize the document, said  
3 that it was not, in fact, signed by him, and denied  
4 having prepared the document.

5 If Your Honor would like, I can voir dire  
6 the witness on this topic.

7 CHIEF JUDGE SLEDGE: There's been no  
8 authentication. The objection is sustained.

9 BY MR. MALONE:

10 Q All right. Captain Kass, looking at what's  
11 been marked as IBS Rebuttal Exhibit 9, did you prepare  
12 this exhibit?

13 A I did.

14 Q And you signed it in the present form?

15 A I did twice.

16 Q As to the earlier, I guess the uncorrected  
17 rebuttal testimony, were you involved in the drafting  
18 or printing out of that exhibit?

19 A I was.

20 Q And that's the one that counsel refers to?

21 A Yes.

22 Q And you signed this affirming its

Capital Reporting Company  
Arbitration - Volume II 07-29-2010

284

1 correctness, and you also testified to that?

2 A I did, and -- and yes.

3 MR. MALONE: All right. We reoffer the  
4 document.

5 CHIEF JUDGE SLEDGE: Any objection?

6 MR. LEVIN: Yes, Your Honor. The document  
7 that has been presented as IBS Rebuttal Exhibit 9,  
8 Captain Kass' Corrected Rebuttal Testimony, is, with  
9 the exception of one additional footnote and Captain  
10 Kass' signature, are materially the exact same  
11 document that he could not authenticate at his  
12 deposition as his Written Rebuttal Testimony. I don't  
13 believe that the fact he has now signed it provides  
14 the proper authentication.

15 MR. MALONE: If Your Honor --

16 CHIEF JUDGE SLEDGE: Do you desire to ask  
17 any questions?

18 MR. LEVIN: Yes, Your Honor.

19 CHIEF JUDGE SLEDGE: Go ahead.

20 MR. LEVIN: Thank you.

21 VOIR DIRE EXAMINATION BY COUNSEL FOR

22 SOUNDEXCHANGE

1 BY MR. LEVIN:

2 Q Good morning, Captain Kass.

3 A Good morning, sir.

4 Q I'm Garrett Levin and I'm representing

5 SoundExchange here.

6 Captain Kass, do you recall being deposed in  
7 this matter?

8 A I do. On July 9th I believe.

9 Q And do you recall at that deposition you  
10 were asked if you recognized what had been submitted  
11 as your Written Rebuttal Testimony?

12 A My recollection was you asked me if it  
13 was -- that was my signature, and my answer was no, it  
14 was not.

15 MR. LEVIN: Permission to approach the  
16 bench.

17 BY MR. LEVIN:

18 Q Captain Kass, you've been handed what's been  
19 marked as SoundExchange Trial Exhibit 43, and that is  
20 your transcript from your deposition on July 9th; is  
21 that correct?

22 A Is it the complete transcript?

1 Q Do you --

2 A I'm asking you. I've never seen this  
3 document.

4 Q So you've never seen the transcript to your  
5 deposition?

6 A Correct.

7 Q Okay. If you could turn to page seven,  
8 which is actually the third page of the document, do  
9 you recall being shown Deposition Exhibit Number 1 at  
10 your deposition?

11 A Would you repeat the question?

12 Q Do you recall being shown Deposition Exhibit  
13 1 at your deposition?

14 A Deposition Exhibit 1. And the exhibits are  
15 attached here?

16 Q They are not attached there. I'm just  
17 asking if you recall.

18 A What is Exhibit Number 1?

19 CHIEF JUDGE SLEDGE: That's not the  
20 question. The question is do you remember seeing  
21 Exhibit Number 1?

22 THE WITNESS: No, because I -- but my

Capital Reporting Company  
Arbitration - Volume II 07-29-2010

287

1 recollection could be refreshed if I knew what it was.

2 CHIEF JUDGE SLEDGE: So your answer is no.

3 THE WITNESS: No.

4 MR. LEVIN: Permission to approach the  
5 witness.

6 CHIEF JUDGE SLEDGE: All right, sir.

7 BY MR. LEVIN:

8 Q Captain Kass, we're about to distribute what  
9 has been marked as SoundExchange Trial Exhibit 44.

10 A Thank you. Yes, I do.

11 Q Yes, you recall being shown Deposition  
12 Exhibit Number 1?

13 A Yes. Now that you've shown me the actual  
14 document, I do recall that.

15 Q Okay. And do you recall that I asked you  
16 whether you recognized this document and you said that  
17 it appeared to be something to do with your rebuttal  
18 testimony?

19 A My recollection is exactly what's in the  
20 transcript on page seven. "Is that your signature  
21 there? No. Whose signature is that? I have no  
22 idea."

1           Q     I'm actually looking up at page six right  
2 now of that transcript, and I asked you "Do you  
3 recognize this document?" And you said, "Not really.  
4 I mean it appears to be something to do with my  
5 rebuttal testimony." Correct?

6           A     That's correct.

7           Q     And then I asked you if you could turn to  
8 page nine of Deposition Exhibit Number 1 and you did.  
9 Then I asked you if that was your signature and you  
10 said no, correct?

11          A     That's correct.

12          Q     And you said, further related to this  
13 document, that you had not, in fact -- that you did  
14 not think you had prepared the document, correct?

15          A     That -- that is correct.

16          Q     And that, in fact, you -- when I asked you  
17 if you prepared the document, you said that probably  
18 -- that you're guessing not because it's got a lot of  
19 technical, legal stuff in it, correct?

20          A     Well, what I actually said is, "I'm guessing  
21 not. It's got a lot of legal stuff in there. So if I  
22 did, it was certainly with the aid of counsel."



1           Q     So, Captain Kass, if you could direct your  
2     attention to line 12 on page seven, I asked you, "So,  
3     Captain Kass, is this your Written Rebuttal Testimony  
4     in this proceeding?" And you said, "I believe so. I  
5     don't know." I asked "Have you ever seen this  
6     document?" And you said "Probably." And I asked you  
7     "But you can't say for certain sitting here whether  
8     you've ever seen this document before?" And you said  
9     "Correct." Correct?

10          A     Correct.

11          Q     And although the document was purportedly  
12     signed with your authorization, you said that, in  
13     fact, you could not definitively say you had ever seen  
14     the document before it was signed, correct?

15          A     That's correct.

16          Q     Now, what has been offered as IBS Rebuttal  
17     Exhibit Number 9 this morning is, with the exception  
18     of your signature and the addition of a footnote,  
19     exactly the same document as what was presented to you  
20     as Deposition Exhibit 1, correct?

21          A     I don't know. I haven't compared them. I  
22     haven't conformed them.

Capital Reporting Company  
Arbitration - Volume II 07-29-2010

290

1 Q What did you do in preparing what has been  
2 marked as IBS Rebuttal Exhibit 9?

3 A We extensively reviewed that recently and I  
4 signed it.

5 Q In other words, you reviewed an already  
6 completed document and then you signed it, correct?

7 A I reviewed a document with counsel, which is  
8 Exhibit 9, and I signed it.

9 Q And what are the differences between Exhibit  
10 9 and Deposition Exhibit 1?

11 A I don't know. I haven't conformed them.

12 Q So what part of Exhibit 9 did you prepare?

13 A I prepared all of it with counsel.

14 Q But I thought you just told me that you  
15 reviewed a document that had already been written and  
16 then you signed it, correct?

17 A I don't recall saying that, but...

18 Q But is that correct, that you reviewed a  
19 document that had already been prepared and then you  
20 signed it?

21 A Yes, if you're referring to Exhibit 9.

22 Q I am referring to Exhibit 9.

Capital Reporting Company  
Arbitration - Volume II 07-29-2010

291

1           A       Yes.

2           Q       So Exhibit 9 was a completed document that  
3 you reviewed and then signed?

4           A       Yes.

5           MR. LEVIN: Your Honor, at this time I would  
6 renew the objection to the admission of IBS Exhibit  
7 Number 9.

8                   At his deposition Captain Kass said he did  
9 not recognize his Written Rebuttal Testimony, he did  
10 not think he had prepared it, he could not say if he  
11 had ever seen it before.

12                   At this point all he's been able to say is  
13 that he reviewed a completed document and signed it.  
14 I do not believe that he can properly authenticate  
15 this document as his written rebuttal statement and I  
16 don't think that having him sign it corrects this  
17 dispute.

18           CHIEF JUDGE SLEDGE: Mr. Malone?

19           MR. MALONE: Thank you.

20           CONTINUED DIRECT EXAMINATION BY COUNSEL

21           FOR IBS

22 BY MR. MALONE:

Capital Reporting Company  
Arbitration - Volume II 07-29-2010

292

1           Q       Captain Kass, looking at IBS Rebuttal  
2 Exhibit 9, which just to keep things uncomplicated,  
3 would you identify Exhibit 9 again by title?

4           A       It's my Corrected Rebuttal Testimony which I  
5 signed.

6           Q       Which parts of that do you recall writing or  
7 editing?

8                   CHIEF JUDGE SLEDGE: That's two different  
9 questions there.

10                  MR. MALONE: All right. I'll ask them  
11 sequential.

12 BY MR. MALONE:

13           Q       What part of IBS Rebuttal Exhibit 9 do you  
14 recall having written?

15           A       I participated in writing all of it.

16           Q       Turning your attention specifically to  
17 footnote --

18                   JUDGE WISNIEWSKI: I don't know that that  
19 answers the question that was asked.

20 BY MR. MALONE:

21           Q       All right. Let's start over again. What --

22                   JUDGE WISNIEWSKI: The question that your

1 counsel asked was what part did you write. Your  
2 answer was you participated in writing parts. The  
3 question is what parts did you write.

4 THE WITNESS: I wrote all of the beginning  
5 of the first page; I wrote the words at the beginning  
6 and the end of paragraph one; I participated in  
7 writing paragraph two.

8 JUDGE WISNIEWSKI: Participated doesn't  
9 work. What did you write?

10 THE WITNESS: I wrote the part after  
11 "Without waiving IBS' objections." That was something  
12 that counsel wrote and suggested that I put in there.  
13 On paragraph three, I wrote that; on paragraph four, I  
14 wrote that; on paragraph five, I wrote the beginning  
15 and the end and counsel advised me that the April 2nd  
16 through October 14th were -- were correct. I reviewed  
17 the documents, but I didn't write the exact wording,  
18 Your Honor.

19 On -- on six counsel assisted me in going  
20 through the testimony of SoundExchange witnesses and  
21 then I wrote the rest of it myself. Seven, that's  
22 mine; eight, that's mine; nine, that's mine. Counsel

1 assisted me in parts of footnote one and two, but the  
2 numbers and the classes were written by me. In  
3 paragraph nine counsel provided the legal sections 114  
4 and 801, and I wrote the words around that.

5           In ten, that's all mine; eleven is mine with  
6 the exception of the -- the legal references under the  
7 Small Business Regulatory Fairness Act; on 12, that's  
8 mine except for counsel assisted me with the proper  
9 section numbers of the law; thirteen, exactly the  
10 same; fourteen are -- are my numbers and -- and  
11 certainly footnote six was -- was personally written  
12 by me; fifteen are my words; sixteen are my words  
13 except that counsel assisted me with the actual  
14 numbers and sections and -- and Federal Register  
15 references; and 17 are my words, essentially a  
16 restating of footnote six; and those are my  
17 signatures.

18           I think it's probably worthy to note that my  
19 signature in final review of this document took place  
20 on July 27th and my deposition took place on July 9th.

21 BY MR. MALONE:

22           Q       Captain Kass, I think you skipped over

Capital Reporting Company  
Arbitration - Volume II 07-29-2010

295

1 paragraph 17.

2           A       I'm sorry. Paragraph 17 are my words and my  
3 numbers. I prepared them.

4           JUDGE ROBERTS: Let me get something  
5 straight so I understand here, Captain Kass.

6           THE WITNESS: Yes, sir.

7           JUDGE ROBERTS: I believe I just heard you  
8 say that we needed to understand that your signature  
9 when you actually signed the document did not come  
10 until what period of time where you actually had a  
11 chance --

12           THE WITNESS: It's on the document, Your  
13 Honor. It's July 27th, 2010.

14           JUDGE ROBERTS: Okay. July 27, 2010.

15           Now, your testimony was filed on June the  
16 7th of 2010, which was -- the filing deadline for  
17 rebuttal testimony I believe was June the 7th or  
18 thereabouts. So are you saying that at that time, on  
19 June the 7th, you had not seen or reviewed your  
20 testimony?

21           THE WITNESS: I had seen it and reviewed it  
22 but not -- not word for word because part of it I had

Capital Reporting Company  
Arbitration - Volume II 07-29-2010

296

1 written and part of it counsel had assisted me with  
2 the numbers.

3 JUDGE ROBERTS: So if I look at the  
4 signature page of what was filed on June the 7th,  
5 that's why you did not sign the testimony at that  
6 time, it was signed for you. I guess that's by you,  
7 Mr. Malone, correct?

8 MR. MALONE: Yes, through procuration.

9 THE WITNESS: That's correct, Your Honor.

10 JUDGE ROBERTS: So on the filing deadline  
11 you did not sign your testimony; is that correct?

12 THE WITNESS: I signed it through counsel.

13 JUDGE ROBERTS: Mr. Malone signed it for you  
14 when it was filed on June the 7th, 2010?

15 THE WITNESS: Yes.

16 JUDGE ROBERTS: All right, sir.

17 MR. MALONE: May I elicit a fact that has  
18 not come to your attention?

19 JUDGE ROBERTS: Please do, Mr. Malone.

20 BY MR. MALONE:

21 Q Looking now at the earlier of the two  
22 documents, the one that Mr. Handzo handed you, do you



Capital Reporting Company  
Arbitration - Volume II 07-29-2010

297

1 know whether or not that went through a number of  
2 intermediate drafts?

3 A It definitely did.

4 Q And how were these drafts exchanged and what  
5 was -- how were these drafts exchanged?

6 A By -- by e-mail. I -- I was writing  
7 sections and paragraphs and then I was sending it to  
8 counsel and -- and counsel was filling in blocks that  
9 I didn't know the sections, the numbers.

10 Q But did you see SoundExchange Exhibit 44,  
11 did you see that before June the 7th in essentially  
12 the form it exists?

13 A It arrived as an e-mail attachment.

14 Q And in what manner was your authorization to  
15 have it signed provided?

16 A By return e-mail or phone call.

17 Q A further question.

18 With respect to IBS Rebuttal Exhibit 9, did  
19 you have an opportunity to, before you signed it, to  
20 have reviewed it and any changes were made therein?

21 A Yes, I very carefully reviewed it word for  
22 word, paragraph for paragraph.

1           Q       So was your input to the document limited in  
2 any way?

3           A       No.

4           Q       Did it occur over a period of time in terms  
5 of days or weeks?

6           A       Yes.

7           Q       Did you feel that this document then  
8 correctly represented your views as to what should be  
9 in the final version?

10          A       Yes.

11          Q       And you did see the final draft?

12          A       Yes.

13          Q       And where were you on June the 7th?

14          A       In New Windsor, New York.

15          Q       And did you talk to counsel on the telephone  
16 on the 7th?

17          A       Yes.

18          Q       Did you exchange e-mails with counsel on the  
19 7th?

20          A       Yes.

21               MR. MALONE: If Your Honor please, I believe  
22 that the witness has satisfied whatever test you may

Capital Reporting Company  
Arbitration - Volume II 07-29-2010

299

1 apply in terms of his having prepared the document  
2 with counsel's assistance at certain times.

3 JUDGE ROBERTS: Well, maybe you can answer  
4 this question for me, Mr. Malone, as to what was filed  
5 on June the 7th, and I am looking at 350.4(d) of our  
6 regulations, which says that the testimony, which  
7 that's what it was, rebuttal testimony, of each  
8 witness shall be accompanied by an affidavit or a  
9 declaration made pursuant to 28 USC 1746 supporting  
10 the testimony.

11 Now, can you tell me how what was done was  
12 consistent with 28 USC 1746 and consistent with  
13 350.4(d)?

14 MR. MALONE: Well, it is true, Your Honor,  
15 in neither case is the U.S. Code citation present.  
16 The substance of the requirement is I think adequately  
17 stated or was intended to be adequately stated.

18 JUDGE ROBERTS: Anything further?

19 MR. MALONE: No, Your Honor. That's it.

20 JUDGE ROBERTS: Okay.

21 CHIEF JUDGE SLEDGE: Mr. Levin, anything  
22 more?

Capital Reporting Company  
Arbitration - Volume II 07-29-2010

300

1 MR. LEVIN: I'd just continue to object on  
2 the grounds that Captain Kass cannot authenticate this  
3 at this time.

4 CHIEF JUDGE SLEDGE: We'll recess.

5 (Brief recess 10:14 a.m. to 10:38 a.m.)

6 (Whereupon, Ms. Chertkof entered the  
7 hearing room.)

8 CHIEF JUDGE SLEDGE: Thank you. We'll come  
9 to order.

10 Mr. Levin, is there any action pending or  
11 anything on the rebuttal testimony filed June 7th?

12 MR. LEVIN: I don't believe it's been  
13 offered as evidence, Your Honor, so no, because...

14 CHIEF JUDGE SLEDGE: Do you have any  
15 objection to the rebuttal testimony filed on June 7th?

16 MR. LEVIN: Certainly, Your Honor. It was  
17 not actually signed by Captain Kass and under oath at  
18 his deposition he said he had not actually -- could  
19 not recall reviewing it or preparing it or, in fact,  
20 ever seeing it before.

21 CHIEF JUDGE SLEDGE: Mr. Malone, any  
22 response, further response than what we've already

Capital Reporting Company  
Arbitration - Volume II 07-29-2010

301

1 heard?

2 MR. MALONE: If Your Honor please, we think  
3 we have -- the witness has explained how the June 7th  
4 document was prepared and has testified to his role  
5 therein and has testified that an ultimate draft was  
6 sent to him by e-mail to review before it was signed  
7 with his authorization.

8 JUDGE ROBERTS: After June 7th, 2010,  
9 correct?

10 MR. MALONE: No, sir, that was not his  
11 testimony. That's not the fact.

12 JUDGE ROBERTS: I believe his testimony was  
13 that he had not seen his testimony prior to the filing  
14 deadline, which is why he did not sign it.

15 MR. MALONE: I think, Your Honor, that he  
16 has -- that he took a very literal reading of the  
17 questions that Mr. Levin had been asking him and I  
18 think his answers were, you know, with -- with the  
19 document in front of him, were in accord with what he  
20 understood was being asked.

21 JUDGE ROBERTS: Do you have anything further  
22 on what under the rules permitted you to sign his

1 testimony and file it by the deadline and not the  
2 witness?

3 MR. MALONE: I am not aware of anything that  
4 deals with this. It was a contemporaneous oral  
5 authorization to sign because he was in Windsor, or in  
6 New Windsor, New York, at the time and was not able to  
7 sign it here in person.

8 JUDGE ROBERTS: But you don't have anything  
9 on meeting the requirement of the regulation?

10 MR. MALONE: I think we were in substantial  
11 compliance that gave forth the assurance that we  
12 should have -- that the testimony is true and correct.

13 I'm not sure, Your Honor, exactly what the  
14 law of New York says about affirmances in the absence  
15 of --

16 JUDGE ROBERTS: Well, the law in New York is  
17 not relevant to the proceeding before the judges and  
18 following or complying with our regulations.

19 MR. MALONE: Well, I think Your Honor is  
20 perhaps technically correct and I have to redress on  
21 substantial compliance.

22 CHIEF JUDGE SLEDGE: All right. From the

1 arguments and the testimony of Captain Kass, the  
2 judges determine that the objection to the rebuttal  
3 testimony filed on June 7 is sustained. The testimony  
4 was not filed in compliance with our regulation of  
5 Section 350.4(d), that the testimony of each witness  
6 will be accompanied by an affidavit or declaration  
7 pursuant to 28 USC 1746 supporting the testimony.

8           The effect of this order and the appropriate  
9 sanction for this order is to strike the testimony of  
10 Captain Kass, and his testimony is stricken.

11           And it appears, Mr. Malone, that that is the  
12 only testimony that you have in this rebuttal phase.

13           MR. MALONE: Well, if Your Honor please, the  
14 judges have before you the witness and he is under  
15 oath and I'm prepared to elicit my oral examination of  
16 the essential facts that were intended to be  
17 presented.

18           CHIEF JUDGE SLEDGE: You are not permitted  
19 to do that. His testimony is stricken.

20           MR. MALONE: Well, if Your Honor please,  
21 that's a rather harsh sanction for what is an omission  
22 on counsel's part to a matter where there was an

Capital Reporting Company  
Arbitration - Volume II 07-29-2010

304

1 attempt to substantially comply.

2 CHIEF JUDGE SLEDGE: It was an appropriate  
3 sanction for a flagrant disregard for the regulations  
4 of these judges and the application of the statute  
5 governing declarations.

6 MR. MALONE: Well, then I ask permission of  
7 the court to proceed with oral examination.

8 CHIEF JUDGE SLEDGE: That's already been  
9 addressed.

10 Anything else?

11 MR. MALONE: Well, I would like him to at  
12 least -- I would like to proceed on the exhibits that  
13 is IBS Rebuttal Exhibits 1 through 8.

14 CHIEF JUDGE SLEDGE: Go ahead.

15 BY MR. MALONE:

16 Q Mr. Kass --

17 CHIEF JUDGE SLEDGE: You've misunderstood my  
18 response.

19 MR. MALONE: Sorry, Your Honor.

20 CHIEF JUDGE SLEDGE: You're not permitted to  
21 elicit any testimony from Captain Kass, and I think to  
22 correct any further confusion on that, Captain Kass,



Capital Reporting Company  
Arbitration - Volume II 07-29-2010

305

1 you're excused.

2 THE WITNESS: Thank you, Your Honor.

3 (Witness excused.)

4 CHIEF JUDGE SLEDGE: Now, can you proceed on  
5 anything else without the testimony of this witness?

6 MR. MALONE: I cannot, Your Honor.

7 CHIEF JUDGE SLEDGE: All right. As I  
8 understand it, that's the case that's been presented  
9 or proffered by IBS.

10 MR. MALONE: Yes, Your Honor.

11 CHIEF JUDGE SLEDGE: All right. Is there  
12 anything to be presented by the next party,  
13 SoundExchange, today?

14 MR. HANDZO: No, Your Honor, not today. I  
15 believe, as we indicated in the letters that we filed  
16 with the Court, we did not have the witnesses  
17 available today and we're prepared to begin on Monday  
18 with Dr. Ordover and Mr. Funn.

19 CHIEF JUDGE SLEDGE: All right. We'll  
20 recess Monday until 9:30.

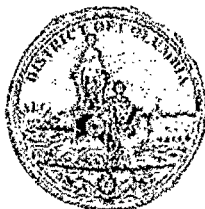
21 (Whereupon, the hearing was adjourned at  
22 approximately 10:47 a.m., to reconvene  
Monday, August 2, 2010, at 9:30 a.m.)

Capital Reporting Company  
Arbitration - Volume II 07-29-2010

306

1 CERTIFICATE OF NOTARY PUBLIC

2 I, SHARI R. BROUSSARD, the officer before whom  
3 the foregoing hearing was taken, do hereby certify  
4 that the testimony appearing in the foregoing pages  
5 was taken by me in stenotypy and thereafter reduced to  
6 typewriting under my direction; that said  
7 transcription is a true record of the testimony given  
8 by said parties; that I am neither counsel for,  
9 related to, nor employed by any of the parties to the  
10 action in which this hearing was taken; and, further,  
11 that I am not a relative or employee of any counsel or  
12 attorney employed by the parties hereto, nor  
13 financially or otherwise interested in the outcome of  
14 this action.



17  
18  
19

*Shari R. Broussard*  
SHARI R. BROUSSARD  
Notary Public in and for the  
District of Columbia

20  
21 My commission expires:  
22 July 14, 2015

Capital Reporting Company  
Arbitration - Volume II 07-29-2010

Page 1

<hr/> <p>1</p> <hr/> <p>1 275:8 277:5,13,16,17,18 286:9,13,14,18,21 287:12 288:8 289:20 290:10 304:13 10:14 300:5 10:38 300:5 10:47 305:21 1000 274:19 101 273:12 274:5 1099 274:10 1120 274:18 114 294:3 12 289:2 294:7 14 306:22 14th 281:2 293:16 16th 280:17 17 294:15 295:1,2 1746 299:9,12 303:7 17th 278:15</p> <hr/> <p>2</p> <hr/> <p>2 273:6 275:9 277:20 278:1,2 305:22 20001 274:11 20036 274:19 2008 279:9,16,17 280:3,9,17 281:2 2009 278:6 2009-1 273:4 2010 273:8 277:19</p>	<p>278:6,15 280:2 295:13,14,16 296:14 301:8 305:22 2015 306:22 202 274:11,20 20540 274:6 23rd 279:9 27 295:14 273 273:6 276 275:3 277 275:8,9 278 275:10 279 275:11 27th 294:20 295:13 28 299:9,12 303:7 280 275:12,13,14 281 275:15 282 275:16 284 275:3 29 273:8 291 275:3 2nd 293:15</p> <hr/> <p>3</p> <hr/> <p>3 275:10 278:10,13,14 3:44 278:15 301 274:14 306 273:6 350.4(d 299:5,13 303:5 367 276:16</p>	<hr/> <p>4</p> <hr/> <p>4 275:11 279:3,6,7 43 285:19 44 287:9 297:10</p> <hr/> <p>5</p> <hr/> <p>5 275:12 280:4,7,8 514 274:14 5th 280:9</p> <hr/> <p>6</p> <hr/> <p>6 275:13 280:12,15,16 626 274:15 649-6000 274:11</p> <hr/> <p>7</p> <hr/> <p>7 275:14 280:18,21,22 303:3 737-7288 274:15 785-0600 274:20 7th 295:16,17,19 296:4,14 297:11 298:13,16,19 299:5 300:11,15 301:3,8</p> <hr/> <p>8</p> <hr/> <p>8 275:15 281:9,12,13 304:13 80 278:17 801 294:4</p> <hr/> <p>9</p> <hr/> <p>9 275:16 281:21</p>	<p>282:3,7,15,17,21 283:11 284:7 289:17 290:2,8,10,12,21 22 291:2,7 292:2,3,13 297:18 9:30 305:20,22 9:37 273:16 900 274:10 91101 274:15 9th 285:8,20 294:20</p> <hr/> <p>A</p> <hr/> <p>a.m 273:17 300:5 305:21,22 able 291:12 302:6 above-captioned 273:11 ABRAHAM 274:13 absence 302:14 academic 278:5,8 accompanied 299:8 303:6 accord 301:19 Act 279:2 294:7 action 300:10 306:10,14 actual 287:13 294:13 actually 286:8 288:1,20 295:9,10 300:17,18 addition 289:18</p>
--	--	---	---

(866) 448 - DEPO

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Capital Reporting Company  
Arbitration - Volume II 07-29-2010

Page 2

<b>additional</b> 284:9	<b>appearing</b> 306:4	289:12 297:14	<b>Building</b> 273:12
<b>addressed</b> 304:9	<b>appears</b> 288:4	301:7 302:5	274:5
<b>addressee</b> 281:5	303:11	<b>available</b> 305:17	<b>Business</b> 294:7
<b>adequately</b>	<b>application</b> 304:4	<b>Avenue</b> 273:13	
299:16,17	<b>apply</b> 299:1	274:5,10,18	<u>C</u>
<b>adjourned</b> 305:21	<b>approach</b> 285:15	<b>aware</b> 302:3	<b>California</b> 274:15
<b>admission</b> 282:11	287:4		<b>Capital</b> 273:14
291:6	<b>appropriate</b> 303:8	<u>B</u>	<b>Captain</b>
<b>advised</b> 293:15	304:2	<b>begin</b> 305:17	276:5,7,12
<b>affidavit</b> 299:8	<b>approximately</b>	<b>beginning</b> 273:16	282:20,22
303:6	273:16 305:21	293:4,5,14	283:10 284:8,9
<b>affirmances</b>	<b>April</b> 277:19 279:9	<b>behalf</b> 273:17	285:2,6,18 287:8
302:14	293:15	274:7,12,16	289:1,3 291:8
<b>affirming</b> 283:22	<b>arguments</b> 303:1	<b>believe</b> 280:1	292:1 294:22
<b>ahead</b> 284:19	<b>arrived</b> 297:13	281:2 284:13	295:5 300:2,17
304:14	<b>assistance</b> 299:2	285:8 289:4	303:1,10
<b>aid</b> 288:22	<b>assisted</b> 293:19	291:14 295:7,17	304:21,22
<b>allowed</b> 281:20	294:1,8,13 296:1	298:21 300:12	<b>carefully</b> 297:21
<b>already</b>	<b>assurance</b> 302:11	301:12 305:15	<b>case</b> 299:15 305:8
290:5,15,19	<b>attached</b>	<b>bench</b> 276:21	<b>certain</b> 289:7
300:22 304:8	286:15,16	285:16	299:2
<b>am</b> 290:22 299:5	<b>attachment</b> 297:13	<b>binder</b> 277:3	<b>certainly</b> 288:22
302:3 306:8,11	<b>attachments</b> 282:1	278:21	294:11 300:16
<b>ameliorated</b>	<b>attempt</b> 304:1	<b>binders</b> 276:21	<b>certificate</b> 278:3
281:19	<b>attempts</b> 279:1	<b>blank</b> 281:17	306:1
<b>answer</b> 285:13	<b>attention</b> 289:2	<b>Block</b> 274:9 279:8	<b>certificates</b> 278:8
287:2 293:2	292:16 296:18	280:8,17 281:1,8	<b>certify</b> 306:3
299:3	<b>attorney</b> 306:12	<b>blocks</b> 297:8	<b>chance</b> 295:11
<b>answers</b> 292:19	<b>August</b> 305:22	<b>Boulevard</b> 274:14	<b>changes</b> 297:20
301:18	<b>authenticate</b>	<b>Brief</b> 300:5	<b>Chertkof</b> 274:22
<b>anything</b> 281:7	284:11 291:14	<b>Broadcasters</b>	300:6
299:18,21	300:2	281:14	<b>CHIEF</b> 274:3
300:11 301:21	<b>authentication</b>	<b>Broadcasting</b>	276:2,22
302:3,8 304:10	283:8 284:14	274:16 279:13	282:2,12,16
305:5,12	<b>authorization</b>	281:15	283:7
<b>appeared</b> 287:17		<b>Broussard</b> 273:14	284:5,16,19
		306:2,18	286:19 287:2,6
			291:18 292:8

Capital Reporting Company  
Arbitration - Volume II 07-29-2010  
Page 3

299:21 300:4,8,14,21 302:22 303:18 304:2,8,14,17,20 305:4,7,11,19 <b>citation</b> 299:15 <b>classes</b> 294:2 <b>Code</b> 299:15 <b>Colin</b> 274:21 <b>College</b> 281:13 <b>Colorado</b> 274:14 <b>Columbia</b> 273:16 306:19 <b>commission</b> 306:21 <b>Company</b> 273:15 <b>compared</b> 289:21 <b>complete</b> 285:22 <b>completed</b> 290:6 291:2,13 <b>compliance</b> 302:11,21 303:4 <b>comply</b> 304:1 <b>complying</b> 302:18 <b>conformed</b> 289:22 290:11 <b>confusion</b> 281:19 304:22 <b>Congress</b> 273:1,12 274:4 <b>Connecticut</b> 274:18 <b>consistent</b> 299:12 <b>constitute</b> 273:10 <b>CONT'D</b> 275:2	<b>contemporaneous</b> 302:4 <b>continue</b> 300:1 <b>CONTINUED</b> 291:20 <b>Copyright</b> 273:1 274:2 279:2 <b>correct</b> 277:11 282:5 285:21 286:6 288:5,6,10,11,14 ,15,19 289:9,10,14,15,2 0 290:6,16,18 293:16 296:7,9,11 301:9 302:12,20 304:22 <b>corrected</b> 277:6,10 281:20 282:1,4 284:8 292:4 <b>corrections</b> 279:18 <b>correctly</b> 298:8 <b>correctness</b> 284:1 <b>corrects</b> 291:16 <b>counsel</b> 276:10 279:8,17,20 280:17 281:1 282:19 283:20 284:21 288:22 290:7,13 291:20 293:1,12,15,19,2 2 294:3,8,13 296:1,12 297:8 298:15,18 306:8,11 <b>counsel's</b> 299:2 303:22 <b>court</b> 304:7 305:16	<b>CRB</b> 273:4 <b>CSR</b> 273:14 <hr/> <b>D</b> <hr/> <b>D.C</b> 273:2,7,13 274:6,11,19 <b>date</b> 278:4 <b>dated</b> 277:19 279:8 280:9,17 281:2 <b>DAVID</b> 274:9 <b>days</b> 298:5 <b>deadline</b> 295:16 296:10 301:14 302:1 <b>deals</b> 302:4 <b>declaration</b> 299:9 303:6 <b>declarations</b> 304:5 <b>definitely</b> 297:3 <b>definitively</b> 289:13 <b>denied</b> 283:3 <b>deposed</b> 285:6 <b>deposition</b> 282:22 284:12 285:9,20 286:5,9,10,12,13 ,14 287:11 288:8 289:20 290:10 291:8 294:20 300:18 <b>describe</b> 279:6 <b>desire</b> 284:16 <b>determine</b> 303:2 <b>differences</b> 290:9 <b>different</b> 292:8 <b>Digital</b> 273:5	279:2 <b>dire</b> 275:2 283:5 284:21 <b>direct</b> 275:2 276:10 289:1 291:20 <b>direction</b> 306:6 <b>dispute</b> 291:17 <b>disregard</b> 304:3 <b>distribute</b> 276:21 287:8 <b>District</b> 273:16 306:19 <b>Docket</b> 273:4 <b>document</b> 277:17 279:10 280:15 283:2,4 284:4,6,11 286:3,8 287:14,16 288:3,13,14,17 289:6,8,11,14,19 290:6,7,15,19 291:2,13,15 294:19 295:9,12 298:1,7 299:1 301:4,19 <b>documents</b> 293:17 296:22 <b>done</b> 279:18 299:11 <b>Dr</b> 305:18 <b>draft</b> 298:11 301:5 <b>drafting</b> 283:17 <b>drafts</b> 297:2,4,5 <b>duly</b> 276:8 <hr/> <b>E</b> <hr/>
---	---	---	--

Capital Reporting Company  
Arbitration - Volume II 07-29-2010

Page 4

<p><b>earlier</b> 283:16 296:21</p> <p><b>editing</b> 292:7</p> <p><b>effect</b> 303:8</p> <p><b>eight</b> 293:22</p> <p><b>eleven</b> 294:5</p> <p><b>elicit</b> 296:17 303:15 304:21</p> <p><b>else</b> 304:10 305:5</p> <p><b>e-mail</b> 297:6,13,16 301:6</p> <p><b>e-mails</b> 298:18</p> <p><b>employed</b> 306:9,12</p> <p><b>employee</b> 306:11</p> <p><b>entered</b> 300:6</p> <p><b>entire</b> 278:16,17</p> <p><b>EPHEMERAL</b> 273:6</p> <p><b>ESQUIRE</b> 274:8,9,13,17</p> <p><b>essential</b> 303:16</p> <p><b>essentially</b> 294:15 297:11</p> <p><b>evidence</b> 300:13</p> <p><b>exact</b> 284:10 293:17</p> <p><b>exactly</b> 287:19 289:19 294:9 302:13</p> <p><b>examination</b> 276:10 284:21 291:20 303:15 304:7</p> <p><b>examined</b> 276:9</p>	<p><b>except</b> 294:8,13</p> <p><b>exception</b> 284:9 289:17 294:6</p> <p><b>exchange</b> 298:18</p> <p><b>exchanged</b> 297:4,5</p> <p><b>excused</b> 305:1,3</p> <p><b>exhibit</b> 277:13,18,20 278:2,10,14 279:3,7 280:4,8,12,16,18 ,22 281:9,13,21,22 282:3,7,15,17 283:11,12,18 284:7 285:19 286:9,12,14,18,2 1 287:9,12 288:8 289:17,20 290:2,8,9,10,12, 21,22 291:2,6 292:2,3,13 297:10,18</p> <p><b>exhibits</b> 275:7,22 282:9 286:14 304:12,13</p> <p><b>exists</b> 297:12</p> <p><b>expires</b> 306:21</p> <p><b>explained</b> 301:3</p> <p><b>extensively</b> 290:3</p> <hr/> <p><b>F</b></p> <hr/> <p><b>fact</b> 279:21 282:22 283:3 284:13 288:13,16 289:13 296:17 300:19 301:11</p> <p><b>facts</b> 303:16</p> <p><b>Fairness</b> 294:7</p>	<p><b>Federal</b> 294:14</p> <p><b>feel</b> 298:7</p> <p><b>fifteen</b> 294:12</p> <p><b>file</b> 302:1</p> <p><b>filed</b> 295:15 296:4,14 299:4 300:11,15 303:3,4 305:15</p> <p><b>filing</b> 295:16 296:10 301:13</p> <p><b>filling</b> 297:8</p> <p><b>final</b> 281:3 294:19 298:9,11</p> <p><b>financially</b> 306:13</p> <p><b>first</b> 276:8 279:21 280:1 293:5</p> <p><b>five</b> 293:14</p> <p><b>flagrant</b> 304:3</p> <p><b>footnote</b> 284:9 289:18 292:17 294:1,11,16</p> <p><b>foregoing</b> 306:3,4</p> <p><b>form</b> 283:14 297:12</p> <p><b>forth</b> 302:11</p> <p><b>fourteen</b> 294:10</p> <p><b>FRED</b> 276:7</p> <p><b>Frederick</b> 275:3 276:14</p> <p><b>FREEDMAN</b> 274:8</p> <p><b>front</b> 277:3 301:19</p> <p><b>Funn</b> 305:18</p> <hr/> <p><b>G</b></p> <hr/> <p><b>Garrett</b> 274:8</p>	<p>285:4</p> <p><b>given</b> 306:7</p> <p><b>governing</b> 304:5</p> <p><b>grounds</b> 300:2</p> <p><b>guess</b> 283:16 296:6</p> <p><b>guessing</b> 288:18,20</p> <hr/> <p><b>H</b></p> <hr/> <p><b>handed</b> 285:18 296:22</p> <p><b>Handzo</b> 274:9 277:1 296:22 305:14</p> <p><b>harsh</b> 303:21</p> <p><b>Harvard</b> 278:3</p> <p><b>haven't</b> 289:21,22 290:11</p> <p><b>having</b> 276:8 282:10 283:4 291:16 292:14 299:1</p> <p><b>heard</b> 295:7 301:1</p> <p><b>hearing</b> 300:7 305:21 306:3,10</p> <p><b>hereby</b> 306:3</p> <p><b>hereto</b> 306:12</p> <p><b>he's</b> 291:12</p> <p><b>Highway</b> 276:16</p> <p><b>Honor</b> 276:4,20 282:18 283:5 284:6,15,18 291:5 293:18 295:13 296:9 298:21 299:14,19 300:13,16</p>
--	---	--	---

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Capital Reporting Company  
Arbitration - Volume II 07-29-2010

Page 5

301:2,15 302:13,19 303:13,20 304:19 305:2,6,10,14 <b>Honors</b> 281:18 <b>Hovanesian</b> 274:14 <b>hundred</b> 278:18 279:1 <hr/> <b>I</b> <hr/> <b>IBS</b> 275:7 276:4,10 277:13,18,20 278:2,8,10,14 279:3,7 280:4,8,12,16,18 ,22 281:1,9,13,21 282:7 283:11 284:7 289:16 290:2 291:6,21 292:1,13 293:11 297:18 304:13 305:9 <b>I'd</b> 276:20 277:4 300:1 <b>idea</b> 287:22 <b>identification</b> 277:14,21 278:11 279:4 280:5,13,19 281:10 282:8 <b>identified</b> 282:10 <b>identify</b> 277:4,16 280:15 292:3 <b>III</b> 273:4 <b>I'll</b> 292:10	<b>I'm</b> 280:1 285:4 286:2,16 288:1,20 295:2 302:13 303:15 <b>Inc</b> 274:7,12 <b>Incorporated</b> 281:14,15 <b>Independence</b> 273:13 274:5 <b>indicated</b> 305:15 <b>indication</b> 281:7 <b>inform</b> 279:1 <b>input</b> 298:1 <b>intended</b> 299:17 303:16 <b>Intercollegiate</b> 274:16 279:13 281:15 <b>interested</b> 306:13 <b>intermediate</b> 297:2 <b>Interrogatory</b> 281:16 <b>invoice</b> 277:19 <b>involved</b> 283:17 <b>issue</b> 281:8 <b>issued</b> 278:8 <b>it's</b> 277:6,18 278:2,5 279:7 280:1 288:18,21 292:4 294:18 295:12,13 300:12 <b>I've</b> 286:2 <hr/> <b>J</b> <hr/>	<b>JAMES</b> 274:3 <b>JARED</b> 274:8 <b>Jenner</b> 274:9 279:8 280:8,17 281:1,8 <b>JUDGE</b> 274:3,4 276:2,22 282:2,12,16 283:7 284:5,16,19 286:19 287:2,6 291:18 292:8,18,22 293:8 295:4,7,14 296:3,10,13,16,1 9 299:3,18,20,21 300:4,8,14,21 301:8,12,21 302:8,16,22 303:18 304:2,8,14,17,20 305:4,7,11,19 <b>judges</b> 273:1 276:17 302:17 303:2,14 304:4 <b>July</b> 273:8 285:8,20 294:20 295:13,14 306:22 <b>June</b> 280:9,17 295:15,17,19 296:4,14 297:11 298:13 299:5 300:11,15 301:3,8 303:3 <hr/> <b>K</b> <hr/> <b>Kass</b> 275:3 276:5,7,12,14 282:19,20,22 283:10 284:8,10	285:2,6,18 287:8 289:1,3 291:8 292:1 294:22 295:5 300:2,17 303:1,10 304:16,21,22 <b>K-A-S-S</b> 276:14 <b>knew</b> 287:1 <hr/> <b>L</b> <hr/> <b>L.L.P</b> 274:9 <b>last</b> 276:13 <b>law</b> 294:9 302:14,16 <b>least</b> 304:12 <b>leave</b> 281:17 <b>legal</b> 288:19,21 294:3,6 <b>Let's</b> 292:21 <b>letter</b> 279:7,13 280:9,16,22 281:3 <b>letters</b> 279:15,19 305:15 <b>Levin</b> 274:8 282:18 284:6,18,20 285:1,4,15,17 287:4,7 291:5 299:21 300:1,10,12,16 301:17 <b>Library</b> 273:1,12 274:4 <b>limited</b> 298:1 <b>line</b> 289:2 <b>literal</b> 301:16
---	---	--	--

(866) 448 - DEPO

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Capital Reporting Company  
Arbitration - Volume II 07-29-2010  
Page 6

<b>Live365</b> 274:12	<b>may</b> 276:20	<b>noted</b> 282:18	289:2 293:5
<b>lot</b> 288:18,21	278:15 296:17		296:4
	298:22	<hr/> O <hr/>	<b>pages</b> 273:6,10
<hr/> M <hr/>	<b>maybe</b> 299:3	<b>oath</b> 300:17	277:5
<b>Madison</b> 273:12	<b>mean</b> 288:4	303:15	278:18,20,22
274:5	<b>meeting</b> 302:9	<b>object</b> 300:1	279:1 282:6
<b>Malone</b> 274:17	<b>members</b> 279:1	<b>objection</b> 282:16	306:4
276:3,4,11,20	<b>membership</b> 278:3	283:8 284:5	<b>paragraph</b> 280:10
277:1,2,15,22	<b>Millennium</b> 279:2	291:6 300:15	293:6,7,13,14
278:12 279:5	<b>Miller</b> 274:18	303:2	294:3 295:1,2
280:6,14,20	281:1	<b>objections</b> 293:11	297:22
281:11,18	<b>mine</b> 293:22	<b>occur</b> 298:4	<b>paragraphs</b> 297:7
282:5,9,13 283:9	294:5,8	<b>October</b> 280:2	<b>pardon</b> 280:2
284:3,15	<b>misunderstood</b>	281:2 293:16	<b>participated</b>
291:18,19,22	304:17	<b>offered</b> 289:16	292:15 293:2,6,8
292:10,12,20	<b>moment</b> 281:17	300:13	<b>particular</b> 278:20
294:21	<b>Monday</b>	<b>officer</b> 306:2	<b>parties</b> 273:18
296:7,8,13,17,19	305:17,20,22	<b>omission</b> 303:21	306:8,9,12
20 298:21	<b>morning</b> 276:2	<b>open</b> 281:7	<b>party</b> 305:12
299:4,14,19	285:2,3 289:17	<b>opportunity</b>	<b>Pasadena</b> 274:15
300:21	<b>move</b> 282:10,15	297:19	<b>pending</b> 300:10
301:2,10,15	<b>myself</b> 280:9	<b>oral</b> 302:4 303:15	<b>PERFORMANCE</b>
302:3,10,19	293:21	304:7	273:5
303:11,13,20		<b>order</b> 276:3 300:9	<b>perhaps</b> 302:20
304:6,11,15,19	<hr/> N <hr/>	303:8,9	<b>period</b> 295:10
305:6,10	<b>neither</b> 299:15	<b>Ordo</b> 305:18	298:4
<b>manner</b> 297:14	306:8	<b>otherwise</b> 306:13	<b>permission</b> 285:15
<b>mark</b> 281:20	<b>nine</b> 281:22 282:9	<b>outcome</b> 306:13	287:4 304:6
<b>marked</b> 275:7	288:8 293:22	<b>outset</b> 282:19	<b>permitted</b> 301:22
277:14,21	294:3		303:18 304:20
278:11 279:4	<b>nor</b> 281:6 306:9,12	<hr/> P <hr/>	<b>Perrelli</b> 279:8,16
280:5,13,19	<b>Northwest</b>	<b>P.C</b> 274:14	<b>person</b> 302:7
281:10 282:8,15	274:10,18	<b>P.L.L.C</b> 274:18	<b>personally</b> 294:11
283:11 285:19	<b>Notary</b> 273:15	<b>p.m</b> 278:15	<b>phase</b> 273:5,11
287:9 290:2	306:1,18	<b>page</b> 277:7 286:7,8	303:12
<b>materially</b> 284:10	<b>note</b> 294:18	287:20 288:1,8	<b>phone</b> 297:16
<b>matter</b> 273:4,11			
279:21 285:7			
303:22			
<b>matters</b> 279:2			



Capital Reporting Company  
Arbitration - Volume II 07-29-2010

Page 7

<p><b>placed</b> 277:3</p> <p><b>please</b> 276:13 279:6 280:15 281:18 296:19 298:21 301:2 303:13,20</p> <p><b>point</b> 291:12</p> <p><b>prepare</b> 283:11 290:12</p> <p><b>prepared</b> 282:20 283:4 288:14,17 290:13,19 291:10 295:3 299:1 301:4 303:15 305:17</p> <p><b>preparing</b> 290:1 300:19</p> <p><b>present</b> 273:17 274:21 283:14 299:15</p> <p><b>presented</b> 282:21 283:1 284:7 289:19 303:17 305:8,12</p> <p><b>print</b> 278:15</p> <p><b>printing</b> 283:18</p> <p><b>prior</b> 301:13</p> <p><b>probably</b> 288:17 289:6 294:18</p> <p><b>proceed</b> 304:7,12 305:4</p> <p><b>proceeding</b> 289:4 302:17</p> <p><b>procuration</b> 296:8</p> <p><b>proffered</b> 305:9</p> <p><b>proper</b> 284:14 294:8</p>	<p><b>properly</b> 291:14</p> <p><b>proposing</b> 282:3</p> <p><b>provided</b> 294:3 297:15</p> <p><b>provides</b> 284:13</p> <p><b>Public</b> 273:15 306:1,18</p> <p><b>purported</b> 283:1</p> <p><b>purportedly</b> 289:11</p> <p><b>pursuant</b> 299:9 303:7</p> <hr/> <p style="text-align: center;">Q</p> <hr/> <p><b>question</b> 280:11 286:11,20 292:19,22 293:3 297:17 299:4</p> <p><b>questions</b> 284:17 292:9 301:17</p> <hr/> <p style="text-align: center;">R</p> <hr/> <p><b>rather</b> 303:21</p> <p><b>reading</b> 301:16</p> <p><b>really</b> 288:3</p> <p><b>rebuttal</b> 273:5,11 275:7 277:6,10,13,18,2 0 278:2,10,14 279:3,7 280:4,8,12,16,18 ,22 281:9,13,20,21 282:1,4,7 283:1,11,17 284:7,8,12 285:11 287:17 288:5 289:3,16 290:2 291:9,15</p>	<p>292:1,4,13 295:17 297:18 299:7 300:11,15 303:2,12 304:13</p> <p><b>recall</b> 285:6,9 286:9,12,17 287:11,14,15 290:17 292:6,14 300:19</p> <p><b>receive</b> 281:4</p> <p><b>received</b> 275:7 281:6</p> <p><b>recently</b> 290:3</p> <p><b>recess</b> 300:4,5 305:20</p> <p><b>recognize</b> 277:7 283:2 288:3 291:9</p> <p><b>recognized</b> 285:10 287:16</p> <p><b>recollection</b> 285:12 287:1,19</p> <p><b>reconvene</b> 305:21</p> <p><b>record</b> 306:7</p> <p><b>RECORDINGS</b> 273:5,6</p> <p><b>redress</b> 302:20</p> <p><b>reduced</b> 306:5</p> <p><b>reference</b> 279:16</p> <p><b>references</b> 294:6,15</p> <p><b>referring</b> 290:21,22</p> <p><b>refers</b> 283:20</p> <p><b>reflect</b> 278:4</p> <p><b>refreshed</b> 287:1</p>	<p><b>regarding</b> 279:18</p> <p><b>Register</b> 294:14</p> <p><b>regulation</b> 302:9 303:4</p> <p><b>regulations</b> 299:6 302:18 304:3</p> <p><b>Regulatory</b> 294:7</p> <p><b>related</b> 288:12 306:9</p> <p><b>relationship</b> 279:12</p> <p><b>relative</b> 306:11</p> <p><b>relevant</b> 302:17</p> <p><b>remember</b> 286:20</p> <p><b>renew</b> 291:6</p> <p><b>reoffer</b> 284:3</p> <p><b>repeat</b> 286:11</p> <p><b>replies</b> 279:17</p> <p><b>reply</b> 281:4,6</p> <p><b>reporter</b> 276:13</p> <p><b>Reporting</b> 273:15</p> <p><b>representative</b> 278:7</p> <p><b>represented</b> 298:8</p> <p><b>representing</b> 285:4</p> <p><b>requirement</b> 299:16 302:9</p> <p><b>reside</b> 276:15</p> <p><b>respect</b> 297:18</p> <p><b>respectfully</b> 282:10</p> <p><b>respective</b> 273:17</p> <p><b>response</b> 281:14</p>
---	---	---	--

(866) 448 - DEPO

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Capital Reporting Company  
Arbitration - Volume II 07-29-2010

Page 8

300:22 304:18 <b>rest</b> 293:21 <b>restating</b> 294:16 <b>retained</b> 275:22 <b>return</b> 297:16 <b>review</b> 294:19 301:6 <b>reviewed</b> 290:3,5,7,15,18 291:3,13 293:16 295:19,21 297:20,21 <b>reviewing</b> 300:19 <b>ROBERTS</b> 274:3 295:4,7,14 296:3,10,13,16,1 9 299:3,18,20 301:8,12,21 302:8,16 <b>role</b> 301:4 <b>room</b> 300:7 <b>Royalty</b> 273:1 274:2 <b>RPR</b> 273:14 <b>rules</b> 301:22 <b>Rushing</b> 274:21 <hr/> S <hr/> <b>sample</b> 278:7 <b>sanction</b> 303:9,21 304:3 <b>satisfied</b> 298:22 <b>screen</b> 278:15 <b>second</b> 279:22 280:10 <b>section</b> 294:9	303:5 <b>sections</b> 278:18 294:3,14 297:7,9 <b>seeing</b> 286:20 300:20 <b>seen</b> 279:10 286:2,4 289:5,8,13 291:11 295:19,21 301:13 <b>sending</b> 297:7 <b>sent</b> 301:6 <b>separate</b> 278:17 281:22 <b>sequential</b> 292:11 <b>seven</b> 286:7 287:20 289:2 293:21 <b>several</b> 278:18,22 <b>Shari</b> 273:14 306:2,18 <b>shown</b> 286:9,12 287:11,13 <b>sign</b> 291:16 296:5,11 301:14,22 302:5,7 <b>signature</b> 284:10 285:13 287:20,21 288:9 289:18 294:19 295:8 296:4 <b>signatures</b> 277:8,9 294:17 <b>signed</b> 283:3,14,22 284:13 289:12,14	290:4,6,8,16,20 291:3,13 292:5 295:9 296:6,12,13 297:15,19 300:17 301:6 <b>significance</b> 278:19 <b>sir</b> 285:3 287:6 295:6 296:16 301:10 <b>sitting</b> 289:7 <b>six</b> 288:1 293:19 294:11,16 <b>sixteen</b> 294:12 <b>skipped</b> 294:22 <b>SLEDGE</b> 274:3 276:2,22 282:2,12,16 283:7 284:5,16,19 286:19 287:2,6 291:18 292:8 299:21 300:4,8,14,21 302:22 303:18 304:2,8,14,17,20 305:4,7,11,19 <b>Small</b> 294:7 <b>sorry</b> 295:2 304:19 <b>SOUND</b> 273:5 <b>SoundExchange</b> 274:7 284:22 285:5,19 287:9 293:20 297:10 305:13 <b>Southeast</b> 273:13 274:5 <b>specifically</b> 292:16	<b>spelling</b> 276:13 <b>STANLEY</b> 274:4 <b>start</b> 292:21 <b>stated</b> 299:17 <b>statement</b> 291:15 <b>STATES</b> 273:1 <b>statute</b> 304:4 <b>stenotypy</b> 306:5 <b>straight</b> 295:5 <b>stricken</b> 303:10,19 <b>strike</b> 280:11 303:9 <b>stuff</b> 288:19,21 <b>submission</b> 282:15 <b>submitted</b> 285:10 <b>substance</b> 299:16 <b>substantial</b> 302:10,21 <b>substantially</b> 304:1 <b>suggested</b> 293:12 <b>Suite</b> 274:10,14,19 <b>Supplemental</b> 281:14 <b>supporting</b> 299:9 303:7 <b>sure</b> 280:1 302:13 <b>Susan</b> 274:22 <b>sustained</b> 283:8 303:3 <b>sworn</b> 276:9 <b>System</b> 274:16 279:14 281:15
---	--	--	--

(866) 448 - DEPO

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Capital Reporting Company  
Arbitration - Volume II 07-29-2010

Page 9

<hr/> <p style="text-align: center;"><b>T</b></p> <hr/> <p><b>tab</b> 277:5,16,17 278:1,13 279:6 280:7,15,21 281:12,17 <b>talk</b> 298:15 <b>technical</b> 288:19 <b>technically</b> 302:20 <b>telephone</b> 298:15 <b>ten</b> 277:7 282:5 294:5 <b>terms</b> 298:4 299:1 <b>test</b> 298:22 <b>testified</b> 276:9,17 284:1 301:4,5 <b>testimony</b> 277:6,10 281:21 282:1,4,20 283:2,17 284:8,12 285:11 287:18 288:5 289:3 291:9 292:4 293:20 295:15,17,20 296:5,11 299:6,7,10 300:11,15 301:11,12,13 302:1,12 303:1,3,5,7,9,10, 12,19 304:21 305:5 306:4,7 <b>Thank</b> 276:4 277:1 284:20 287:10 291:19 300:8 305:2 <b>that's</b> 278:16 281:2 282:5 283:20 286:19</p>	<p>288:6,11 289:15 292:8 293:21,22 294:5,7 296:5,6,9 299:7,19 301:11 303:21 304:8 305:8 <b>thereabouts</b> 295:18 <b>thereafter</b> 306:5 <b>therein</b> 297:20 301:5 <b>There's</b> 283:7 <b>third</b> 279:22 280:2 286:8 <b>thirteen</b> 294:9 <b>Thursday</b> 273:8 <b>title</b> 292:3 <b>today</b> 305:13,14,17 <b>topic</b> 283:6 <b>total</b> 278:22 <b>transcript</b> 285:20,22 286:4 287:20 288:2 <b>transcription</b> 306:7 <b>Trial</b> 285:19 287:9 <b>Tribunal</b> 274:2 <b>true</b> 277:10 299:14 302:12 306:7 <b>turn</b> 286:7 288:7 <b>Turning</b> 282:14 292:16 <b>twice</b> 283:15 <b>typewriting</b> 306:6</p>	<hr/> <p style="text-align: center;"><b>U</b></p> <hr/> <p><b>U.S</b> 299:15 <b>ultimate</b> 301:5 <b>unable</b> 283:2 <b>uncomplicated</b> 292:2 <b>uncorrected</b> 283:16 <b>understand</b> 282:2 295:5,8 305:8 <b>understood</b> 301:20 <b>UNITED</b> 273:1 <b>University</b> 278:3 <b>unnumbered</b> 277:5 <b>USC</b> 299:9,12 303:7</p> <hr/> <p style="text-align: center;"><b>V</b></p> <hr/> <p><b>VanEaton</b> 274:18 281:1 <b>version</b> 298:9 <b>views</b> 298:8 <b>voir</b> 275:2 283:5 284:21 <b>Volume</b> 273:6</p> <hr/> <p style="text-align: center;"><b>W</b></p> <hr/> <p><b>waiving</b> 293:11 <b>Washington</b> 273:2,7,13 274:6,11,19 <b>Webcasting</b> 273:4 <b>website</b> 278:15,16,17</p>	<p>279:16,19 <b>weeks</b> 298:5 <b>we'll</b> 276:2 281:17 300:4,8 305:19 <b>we're</b> 287:8 305:17 <b>we've</b> 282:14 300:22 <b>whatever</b> 298:22 <b>Whereupon</b> 276:6 300:6 305:21 <b>whether</b> 287:16 289:7 297:1 <b>whom</b> 306:2 <b>Whose</b> 287:21 <b>WHRB</b> 278:3 <b>WILLIAM</b> 274:3,17 <b>Windsor</b> 276:16 298:14 302:5,6 <b>WISNIEWSKI</b> 274:4 292:18,22 293:8 <b>witness</b> 275:2 276:8 283:6 286:22 287:3,5 293:4,10 295:6,12,21 296:9,12,15 298:22 299:8 301:3 302:2 303:5,14 305:2,3,5 <b>witnesses</b> 293:20 305:16 <b>wording</b> 293:17 <b>work</b> 293:9</p>
--	---	---	---

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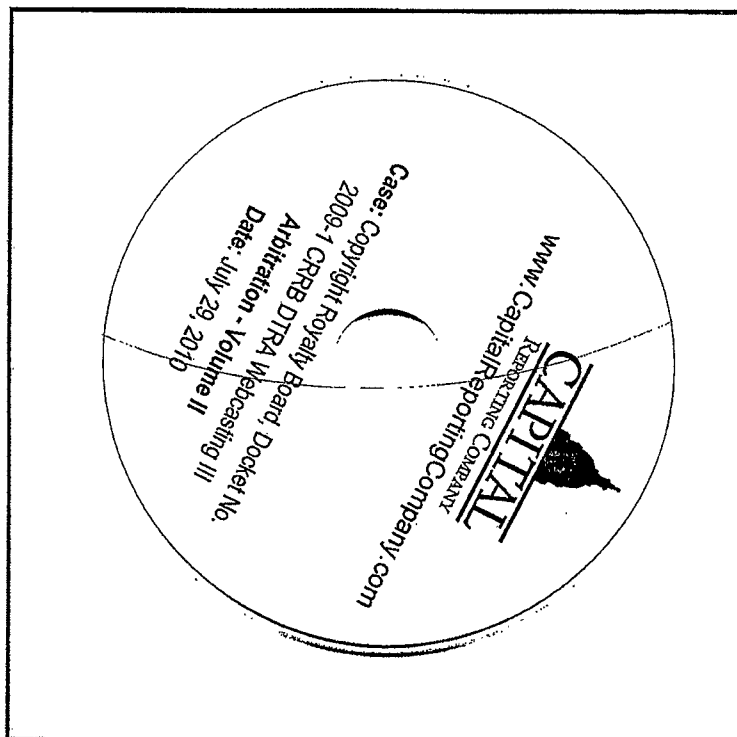
Capital Reporting Company  
Arbitration - Volume II 07-29-2010  
Page 10

<p><b>worthy</b> 294:18</p> <p><b>write</b> 293:1,3,9,17</p> <p><b>writing</b> 292:6,15 293:2,7 297:6</p> <p><b>written</b> 283:1 284:12 285:11 289:3 290:15 291:9,15 292:14 294:2,11 296:1</p> <p><b>wrote</b> 293:4,5,10,12,13 ,14,21 294:4</p> <hr/> <p>Y</p> <hr/> <p><b>YACOBIAN</b> 274:13</p> <p><b>York</b> 274:10 276:16 298:14 302:6,14,16</p> <p><b>you've</b> 276:17 285:18 286:4 287:13 289:8 304:17</p>			
---	--	--	--



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